Sunrise Nursing Home, Inc. *and* Local 200A, Service Employees International Union. Cases 3–CA–19950 and 3–CA–20311

February 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

On September 19, 1997, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief to the General Counsel's answering brief. The General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt his recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sunrise Nursing Home, Inc., Oswego, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

''(e) Within 14 days after service by the Region, post at its facility in Oswego, New York, copies of the attached notice marked 'Appendix.'[32] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 29, 1996.''

[1] In his fourth Conclusion of Law, the judge inadvertently neglected to state that the appropriate unit excludes casual and temporary employees. The parties stipulated to these exclusions. We correct the judge's inadvertent error.

We delete the judge's reference, in the remedy section of his decision, to *Florida Steel Corp*., 231 NLRB 651 (1977). We also amend the judge's remedy to provide that backpay shall be computed in the manner provided in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), rather than *F. W. Woolworth Co*., 90 NLRB 289 (1950).

[2] In accord with *Excel Container, Inc*., 325 NLRB No. 14 (Nov. 7, 1997), we shall change the date in par. 2(e) of the recommended Order from March 18, 1996, to January 29, 1996, the date of the first unfair labor practice.

Naima R. Clarke, Esq. and *Ronald Scott, Esq*., for the General Counsel.

Linda Alario, Esq. (Bryant, O'Dell & Basso, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Upon the basis of a charge filed on March 18, 1996, by Local 200A, Service Employees International Union (the Union), in Case 3–CA–19950 and a charge and amended charge filed by the Union on September 30, 1996, and October 16, 1996, respectively, in Case 3–CA–20311, against Sunrise Nursing Home, Inc. (the Respondent or Sunrise), an order consolidating cases, amended consolidated complaint and notice of hearing was issued on December 20, 1996, alleging that the Respondent had failed and refused to bargain collectively with the exclusive bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). By amended answer timely filed, the Respondent denied the material allegations in the amended consolidated complaint and raised certain affirmative defenses.

A hearing was held before me in Oswego, New York, from January 6 through 8, 1997. Subsequent to the close of the hearing the General Counsel and the Respondent filed briefs.

On the entire record[1] and the briefs of the parties and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material, is and has been a corporation, with an office and place of business located at 17 Sunrise Drive, Oswego, New York (the Respondent's facility), and has been engaged in the operation of a nursing home. Annually, the Respondent in the conduct of its business operations derives gross revenues in excess of $100,000 and annually receives at its Oswego, New York facility Federal medicare funds in excess of $10,000. The amended consolidated complaint alleges, the Respondent admits, and I

[1] After the close of the hearing the General Counsel moved for the admission of documents into evidence as part of the General Counsel's formal papers 1(a)–1(o) to be marked as G.C. Exhs. 1(p): Respondent's motion to withdraw or dismiss complaint); 1(q): statement in opposition to Respondent's motion to dismiss complaint; and 1(r): Board's Ruling on Respondent's motion to withdraw or dismiss complaint. Pursuant to Sec. 102.26 of the Board's Rules and Regulations and in view of the fact that the Respondent does not oppose the motion, I, therefore, grant the motion and receive into evidence these documents as G.C. Exhs. 1(p)–1(r).

find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Respondent has been a health care institution within the meaning of Section 2(14) of the Act.

The Successorship Issue

The amended consolidated complaint alleges and the Respondent admits that the Respondent became the receiver of the Harr-Wood Nursing Home about April 21, 1995, and since then has continued to operate the business of Harr-Wood and has employed as a majority of its employees individuals who were previously employees of Harr-Wood. The amended consolidated complaint also alleges that based on this and the fact that the Respondent continues to operate the business of Harr-Wood in ''basically unchanged form'' the Respondent has ''continued the employing entity and is a successor to Harr-Wood.'' The Respondent denies these allegations.

An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a ''substantial and representative complement,'' in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a ''substantial continuity between the enterprises.'' *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41–43 (1987), citing, inter alia, *NLRB v. Burns International Security Services*, 406 U.S. 272, 290 fn. 4 (1972). Also see *Task Force Security & Investigation*, 312 NLRB 412 (1993).

The Supreme Court in *Fall River*, supra at 43, summarized the factors relevant to determining continuity as follows:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors, and whether the new entity has the same production process, produces the same products, and has basically the same body of customers.

The court further instructed that these characteristics of the substantial continuity factor were to be assessed primarily from the perspective of the involved employees, that is, ''whether 'those employees who have been retained will . . . view their job situations as essentially unaltered.''' Id., quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973).[2] Further, although each factor must be analyzed separately, they must not be viewed in isolation and ultimately, it is the totality of the circumstances which is determinative. See *Fall River*, supra.

Moreover, as recognized in *NLRB v. Burns International Security Services, Inc.*, supra, successorship may depend upon the continued appropriateness of the bargaining unit. As stated by the Supreme Court in *Burns* at 280.

> It would be a wholly different case if [the successor's] operational structures and practices [were so different that the existing] bargaining unit was no longer an appropriate one.

In construing this provision, the Board has held that in ''all of the Board cases in which successorship was found are predicated on the finding that the predecessor's bargaining unit remained intact under the successor and continued to be an appropriate unit . . . . A determination must therefore be made as to the integrity of the [predecessor] bargaining unit after the transfer . . . .'' *Border Steel Rolling Mills, Inc.*, 204 NLRB 814 (1973). While the Board has held subsequent to *Burns*, supra, that employees acquired from a predecessor ''themselves must constitute an appropriate unit,'' *Irwin Industries*, 304 NLRB 78 (1991), the Board however, has also held that the Act does not require an evidently only, ultimately, or most appropriate unit, but only that it be at least appropriate in nature. *Vincent M. Ippolito, Inc.*, 313 NLRB 715 (1994), *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950).

In this case the Respondent admits that it has continued to operate the business of Harr-Wood presumably as a nursing home, in basically unchanged form, employing as a majority of its employees, individuals who were previously employees of Harr-Wood in a bargaining unit appropriate for the purposes of collective bargaining. Under these circumstances I find and conclude that the Respondent has continued the employing entity and is a successor to Harr-Wood.

II. THE LABOR ORGANIZATION INVOLVED

Local 200A, Service Employees International Union is a labor organization within the meaning of Section 2(5) of the Act.

Also, the parties stipulated that the following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All regularly scheduled full-time and part-time service and maintenance, technical and clerical employees employed by Respondent, excluding all professional, managerial and confidential employees, casual employees, temporary employees, guards and supervisors as defined in the Act, as amended.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The amended consolidated complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the pay rate of a bargaining unit employee and by unilaterally taking back accrued vacation days from bargaining unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct. The Respondent denied these allegations.[3]

Background

The Respondent is a 120-bed nursing home. On April 21, 1995, Joseph Castaldo, the Respondent's current president,

[2] Also see *Nephi Rubber Products Corp. v. NLRB*, 976 F.2d 1361 (10th Cir. 1992).

[3] By motion dated August 7, 1996, the Respondent requested that the complaint be withdrawn on the ground that the Region failed to adequately investigate the facts or, in the alternative, that the complaint be dismissed lacking merit. Counsel for the General Counsel opposed the motion on April 29, 1996. By letter dated September 10, 1996, the Board denied the Respondent's motion in its entirety. Also see fn. 1, here.

was appointed receiver of what was then known as Harr-Wood Nursing Home. From April 21, 1995, to approximately April 21, 1996, the Respondent operated as Joseph Castaldo, Receiver d/b/a Sunrise Nursing Home. On April 21, 1996, the Respondent became incorporated as Sunrise Nursing Home, Inc.

At the time the Respondent took over Harr-Wood Nursing Home, the Union represented all regularly scheduled full-time and part-time service and maintenance, technical, and clerical employees, excluding all professionals, managerial and confidential employees.[4] There was also a current collective-bargaining agreement in place (the Harr-Wood Agreement), the effective date of which was November 1, 1992, to September 30, 1995. By letter dated May 5, 1995, the Respondent recognized the Union as the collective-bargaining agent of its employees and further informed the Union that it was rejecting the Harr-Wood Agreement, and that it would review the wages and other terms and conditions of employment of bargaining unit employees in order that it might set their initial terms and conditions of employment. The Respondent also expressed an intention to consult with the Union before setting initial terms and conditions of employment.

Thereafter, on May 15, 1995, the Respondent and the Union met to discuss this matter and to determine the substance of the labor agreement between the Union and Harr-Wood. By letter dated May 25, 1995, the Respondent set initial terms and conditions of employment for the bargaining unit which included the wages as contained in the Harr-Wood Agreement, ''together with such modifications, clarifications, addenda, policies, practices and understandings, as may exist as of May 24, 1995.'' The letter listed a number of exclusions, none of which made reference to the hourly wages of bargaining unit employees. Bargaining negotiations for a new collective-bargaining agreement began in July 1995. There were approximately 22 collective-bargaining sessions, between July 10, 1995, and May 20, 1996. Robert H. Basso, an attorney, and Castaldo served as the lead negotiators for the Respondent. The Union's bargaining committee's chief spokesperson was Beth Barrett.

A. *The Evidence*

1. The change in the hourly wage of Bernadette Grinnell

In July 1980, Bernadette Grinnell was hired by Harr-Wood Nursing Home as a graduate practical nurse (GPN). A GPN is one who has graduated from nursing school but has not taken and/or passed the state board exam to become a nurse, By permit, which lasts for 1 year, a GPN may perform nursing duties; however, she is required to pass the state board exam within that year. New York State Education Law Section 6907. Grinnell failed to pass the state board exam within the requisite period and, consequently, beginning about the middle of 1981, Grinnell began performing the duties of a nurses aide. Harr-Wood did not, however, reclassify her at the time nor change her wage rate. Thereafter, in 1991, Harr-Wood required Grinnell to take an oral and written test to become a certified nurse's aide (CNA), which she passed and was then reclassified as a CNA effective January 1, 1992. Again, there was no change made in her hourly wage. The above events occurred before the Union became the representative of the bargaining unit.

As of April 21, 1995, when the Respondent took over Harr-Wood Nursing Home, Grinnell was earning $9.70 per hour—a rate above the pay scale for CNA's as provided for in the Harr-Wood agreement. As such, Grinnell was recognized as a ''red circled'' or ''off scale'' employee by Harr-Wood and the Union. There were other such ''off scale'' employees as well, including CNA Betty Ellis and Vicki Tyler.[5]

In January 1996, the Respondent's then director of nursing, Dawn Fiedler, advised the then administrator, Edward Leffler, that there were employees who might be receiving a GPN rate of pay although they had failed their licensing exams and were working as nurses aides. Leffler testified that the Respondents' concern was that people should be paid at the rate for the classification of work they were performing and that salaries should be adjusted for those employees who were not.

Ann Perry, chief union steward and chairperson of the Union's bargaining committee at the time, testified that ''that day or the day'' before the January 18, 1996 negotiating session between the Union and the Respondent, CNA's Ellis and Tyler advised her that their wages were to be reduced. Perry then discussed the matter with Jim Donohue, the new administrator, who told her that ''there were four people that the reductions were going to be hit by,'' and she was shown a list of names of the affected employees totaling eight in number. Perry further testified that she was informed of an effective date for the salary reductions but did not recall the date.

At the January 18, 1996 bargaining session,[6] Perry arrived late and visibly upset immediately raised the issue of the proposed reduction in the wages of certain employees and that the Respondent had failed to give the Union notice of such proposed reductions in salaries although it had an obligation to do so.[7] She stated that Castaldo was angry at her for coming late and for raising the issue of the wage reduction. Perry

[4] The Respondent and the Union later agreed to exclude casual and temporary employees from the bargaining unit.

On July 20, 1992, the Union was certified as the exclusive collective-bargaining representative of the above unit employees employed by Harr-Wood. From about July 20, 1992, to April 21, 1995, based on Sec. 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the unit employees employed by Harr-Wood.

[5] The Respondent continued the practice of paying some CNAs at a rate higher than the scale in the Harr-Wood agreement.

[6] Representing the Respondent at this meeting were Joseph Castaldo, the Respondent's president, Leffler, the Respondent's prior administrator, Jim Donohue, the new administrator, and Robert Basso, Esquire, the Respondent's attorney. For the Union were Perry, Beth Barrett, a union representative and members of the employees' negotiating committee.

[7] When cross-examined by the Respondents' counsel who phrased the questions in terms of Perry having raised this issue at the January 18, 1996 meeting, as one involving the reduction of GPN salaries paid to employees who were in reality classified as CNA's, Perry responded, ''After I brought it up.'' Basso's affidavit dated August 7, 1996, states that Perry had ''demanded, in a loud voice, to know why Sunrise had 'reduced GPN wages!'' Castaldo testified that Perry had complained about the reduction in wages of ''Nurses Aides and GPN's. . . . She called them both Nurses Aides and Graduate Practical Nurses.''

also testified that when she walked into the January 18, 1996 meeting, she believed that ''the decision to reduce the wages'' of ''Ms. Grinnell and the other employees had already been made.'' Perry related that at the time of the January 18, 1996 meeting she had not as yet spoken to Bernadette Grinnell about the proposed reduction in her wages. Perry added that subsequent to the January 18 meeting she met with Donohue three or four times to discuss the issue of the proposed wage reductions of different employees and as to the reasons for the adjustments. Perry could not recall what was further said at the January 18, 1996 meeting.

Union Representative Beth Barrett testified that it was at the January 18, 1996 meeting that she first learned that Grinnell's wages would be reduced along with other employees when Perry angrily protested the proposed reduction in wages. Barrett recalled that a loud and unpleasant verbal exchange occurred between Perry and Castaldo in which Perry expressed her consternation at the Respondent's intent to cut employees' wages while Castaldo angrily told Perry that she was ''rude for being late and that they [the Respondent] didn't have to talk to the Union about this, they could cut their pay.'' Barrett intimated that while the Union requested the list of the employees affected by the proposed reduction in wages of ''red-circled'' employees, the Respondent failed to provide such a list.

Edward Leffler, the Respondent's former administrator; testified that at the January 18, 1996 meeting, Perry ''arrived late after the bargaining session began and was visibly upset and was screaming about cutting individual employees' salaries . . . . [S]he was talking about the GPN's.'' situation in which there was discussions about refiguring rates for those individuals that were not GPN's but being paid as GPN's.'' Leffler continued;

> I don't think she was aware at the time. I mean she really—all she came out and said was that we were arbitrarily, or we were cutting salaries. I don't even think that she was aware of the particulars involved at that time, so I took the opportunity to explain to her and the rest of the bargaining committee the rationale and what had transpired prior to her entering the room and what had transpired at the nursing home and the steps we had taken . . . [a]nd went on to explain to Ann Perry and the rest of the bargaining team what the rationale was which is we don't feel obligated to pay somebody a rate as a Nurse, a GPN, if they're functioning as a Nurses Aide.[8]

Leffler stated that he then asked the Union ''whether or not they had any alternatives to this approach and they didn't have any and offered none.''[9] Leffler added that ''those individuals that would be impacted on this . . . had been approached and advised if they want union representation, they can have union representation.'' Leffler also testified that at the next bargaining session, the date of which he could not remember, the issue of the wage reduction was not discussed at all.

Regarding this Basso testified that Perry had raised the issue of the wage reduction at the January 18, 1997 meeting and this subject was discussed for over an hour.[10] Basso related that after Perry had arrived about an half hour late to the meeting and interrupted negotiations on other issues, she declared that the Respondent ''had changed the GPN wages.'' According to Basso Leffler then explained that the GPN scale had not been changed, that eight nurses in the bargaining unit did not have the licenses to perform the work of GPN's. That the Respondent had called in these employees and asked them if they had the requisite licenses and that ''they could have a union representative there,'' and that those not qualified as GPN's would be reclassified as ''Nurses Aides.''[11] Basso related that Leffler then said that the Respondent would reinstate employees to the GPN classification on their obtaining their licenses. Leffler also asked for any suggestions or ideas as to how to resolve this problem ''that Sunrise was willing to discuss the matter'' and since ''nothing was forthcoming'' Basso felt that they had exhausted the subject, called for a recess, and the Respondent's negotiators caucused. Basso added that at subsequent negotiation sessions the subject of the wage reductions was not brought up by the Union and the Union failed to either request negotiations thereon or make any proposals regarding it.

Ayotte's notes of the January 18, 1996 meeting reflect that the Respondent's administrator, James Donohue stated that five people are no longer recognized as nurses unless they take ''a board CNA,'' and even if they are classified as CNA's the Respondent should not pay them as GPN's.[12] Also, Perry testified that at the January 18, 1996 meeting or at a later one, Castaldo stated that ''no CNA deserved that salary.'' Castaldo denied having said this.

At the time of the January 18, 1997 negotiation session no salaries had as yet been adjusted and Grinnell's wage was not changed from $9.70 an hour to $9.10 an hour until January 28, 1996. Between January 18 and 28, director of nursing, Dawn Fiedler,[13] informed Grinnell that ''as of the next weeks paycheck, your wage is going to be reduced to $9.10 because it was never adjusted when you became a Certified

[8] Barrett testified that Leffler did not mention that the Respondent would be reducing the wages of ''offscale'' employees or CNA's and therefore was unaware that Grinnell was among the employees who would have their wages reduced. Barrett stated that Leffler had said that employees being paid at a GPN level who were not licensed as such or who had failed to pass their board would have their pay reduced to that of a CNA consistent with their seniority.

[9] Perry testified that she could not remember Leffler having said this at the January 18 meeting. Moreover, while Barrett acknowledged that she had heard Leffler testify that he had asked the Union for ''alternatives'' to the Respondent's approach to reduction in some employees wages, she did not say that she had heard him state this at the meeting.

[10] However, the notes of this meeting in evidence, recorded by Annette Marie Ayotte, a member of the Union's bargaining committee, indicate that this meeting started at 2:15 p.m., despite Basso's indication in his affidavit dated August 7, 1996, that the meeting started at 2 p.m. and Perry arrived at 2:30 p.m., and that discussion on this issue lasted only from ''2:45 to 2:55'' p.m., which comports with Perry's having arrived at the meeting about one half hour late and she then immediately interrupted the meeting and raised the issue of the proposed wage reduction.

[11] This latter from Basso's affidavit.

[12] Donohue was not called as a witness in this case.

[13] Fiedler did not testify at this hearing.

Nurses Aide.'' Grinnell related that she then informed Perry about that ''the following day.''[14]

Both Perry and Union Representative Beth Barrett unequivocally testified that the Respondent did not directly notify them of its decision to reduce the wages of certain bargaining unit employees, including Grinnell.[15] Moreover, Castaldo's testimony was confusing about this. At first he testified that both Perry and Barrett knew about the proposed reduction in salaries at the January 18, 1996 meeting. On cross-examination Castaldo stated that he was unsure if Barrett was apprised of Grinnell's proposed wage reduction, but that union representatives had been so notified by Donohue. Castaldo then testified that Donohue had told him that Barrett had been told of the change prior to Grinnell's actual reduction in salary. He finally related that Fiedler had advised him that she had informed Perry of the intent to reduce Grinnell's wages and Castaldo speculated that Perry should have notified Barrett of the change. Additionally, even as late as June 1996, Castaldo admitted that he believed that the Respondent was not obligated to notify the Union of the change in Grinnell's wages.

Perry testified that the Union's bargaining committee made no proposals to the issue of the wage reductions at the January 18, 1996 meeting, and discussion of this subject ended when ''somebody brought up that we needed to go into other areas that we were dealing at the time.'' Barrett testified that the Union offered no proposals at the January 18 or subsequent negotiation sessions, regarding the issue of the reduction in wages because of the Union's feeling that it was already a ''done deal'' by the Respondent. The Union subsequently filed grievances on behalf of Grinnell and Tyler and Ellis when their wages were reduced.

At the March 8, 1996 bargaining session (15th), the Union proposed, among other things, that any ''red circled'' employee receive a $500 lump sum bonus in lieu of a wage increase, and that ''off scale'' employees be recognized by adding a new 8-year step. According to Basso's affidavit dated August 7, 1996, Barrett stated that the Union had no ''red circle'' or ''off scale'' list, but there were employees like Grinnell and Ellis who could be so classified. Basso also in his affidavit states:

> Upon information and belief, Sunrise's determination to reduce Ms. Grinnell's wage rate from the GPN scale to the CNA scale was made on January 28, 1996 after being thoroughly discussed at the January 18th negotiating session; became a final decision after the Union had the opportunity to offer a proposal at the February 8th bargaining session, and after the February 21, 1996 Step II grievance.

Grinnell worked as a CNA and according to Perry so far as she knew never worked as a nurses aide.

2. ''Take Back'' of accrued vacation

Negotiations for a new collective-bargaining agreement began in July 1995 and continued until May 1996, with about 18–22 bargaining sessions. The parties agreed to a ground rule that economic proposals would be negotiated as a package. It appears that ''tentative agreements'' were subject to the ''ratification of parties.'' One of the subjects being negotiated was that of vacations for bargaining unit employees. When the Respondent took over the nursing home on April 21, 1995, the vacation schedule in place was the schedule contained in article 17 of the Harr-Wood agreement. Article 17.1 contained two vacation accrual schedules—one for employees hired prior to November 1, 1992 (17.1(a)) and the other for employees hired after that date (17.1(b)). Under section 17.1(a) employees accrued 10 days of vacation in the first year of employment, with an additional day being added in each subsequent year up to year 10. Employees accrued a maximum 25 days of vacation after 15 years. Under article 17.1(b) employees earned 10 days after 1 year of employment; 15 days after 5 years; 20 days after 10 years, and the maximum 25 days after 15 years. The vacation schedule under the Harr-Wood agreement was continued by the Respondent until May 20, 1996.

However, since the Respondent maintained that it had no financial liability for vacation that had been earned under Harr-Wood, the Respondent paid employees only for vacation accrued after April 21, 1995, using the employees hiring dates at Harr-Wood, to determine the years of completed service to calculate vacation. The Respondent permitted employees to take off, without pay, the vacation days that they accrued under their Harr-Wood employment.

Beth Barrett testified that throughout bargaining the Respondent sought concessions to the Harr-Wood vacation schedule, mainly in the form of having all employees accrue vacation as if they all began their employment on April 21, 1995. For example, the record shows that on January 18, 1996, the Respondent proposed that section 17.1(a) of the Harr-Wood schedule be deleted and that employees accrue vacation under section 17.1(b) at the first level as of April 20, 1996. This proposal was rejected by the Union. The Union's counterproposal was to use 17.1(b) effective the first full month after ratification for all employees but with no change in their benefit accrual. By no change in their benefit accrual, the Union intended that employees would accrue vacation as of their original date of hire and not the date that the Respondent became the employer. Barrett testified that there were many vacation proposals. As late as May 17, 1996, the Respondent's vacation proposal still included a provision that the employees' anniversary date for the purposes of vacation be April 21, 1995. The Union also pro-

[14] Although Grinnell could not establish the date with absolute certainty, it can be inferred from her and Perry's testimony, that Grinnell was notified between these dates. ''[N]ext week's paycheck'' in relation to an effective date of January 28 would suggest that Fiedler informed Grinnell of the change during the week of January 21. Perry testified that she did not talk to Grinnell about her wage reduction before January 18. Also effective January 21 and 28, the Respondent reduced the hourly wage of about seven other employees besides Grinnell, all of whom, except Ellis and possibly Vicki Tyler, were classified as GPN's at the time, but did not meet the requirements of such classification for various reasons.

[15] While Barrett testified that she had received notice of the reduction of Grinnell's' wages and that of other employees at the January 18, 1996 meeting, she also stated in her affidavit given to a Board agent on May 22, 1996, that, ''The Employer did not give the Union notice before it made changes in the wages of Bernadette Grinnell and Betty Ellis.'' Barrett explained this inconsistency in that the Union had received notice regarding Grinnell's wage change through Perry's protest at the January 18, 1996 meeting and Castaldo's response that the Respondent was not obligated to give the Union notice regarding any wage reductions or changes.

posed having all employees earn 10 days of vacation for 1 year and then reinstating article 17.1 in its entirety; and implementing article 17.1(b) for all employees, with employees retaining their original anniversary dates.

Marshall Blake, the union president, testified that as of early May a stalemate existed between the parties with about a half dozen issues, including vacation still unresolved. At a May 10, 1996 meeting between Blake, Barrett, Castaldo, and Basso, Castaldo presented the Union with information regarding the number of employees and the total of vacation days accrued based on their seniority. This information reflected the ''maximum'' vacation accrued but not the actual time taken or remaining, or whether the days were accrued under Harr-Wood or under Sunrise.

At the May 20, 1996 meeting Blake proposed that the ''Loretto'' schedule[16] be implemented as of May 20, 1996. The parties agree that for purposes of determining an employees length of service for vacation, the Blake proposal contemplated using the employees date of hire under Harr-Wood. According to the Respondent the reason for the May 20 effective date for the new vacation schedule was the Respondent's concern that if word got out that a new schedule would be effective some time in the future, the employees would rush to take the vacationtime accrued under the old schedule prior to the new schedules effective date.

The evidence indicates that the parties thought that agreement had been reached on the entire contract, pending settlement of a pension matter. Barrett testified that counsel for the Respondent, Robert Basso, at the May 20 meeting stated, ''If we understand you [the Union] we have an agreement.''[17] The issue in dispute between the parties is what would be done about employees who had already accrued vacation under article 17.1(a) and the fourth tier of article 17.1(b). The Union maintains that the agreement was that employees as of May 20, 1996, who had earned 25 days under either 17.1(a) or (b) would waive accrued vacation in excess of the Loretto schedule (20 days) that had not yet been taken. Further that unpaid vacation days earned under the Harr-Wood tenure would not be waived. According to the Respondent, under its understanding of the agreement employees with continuous service from 2 to 4 years and 6 to 9 years would also forfeit days as would those who had accrued in excess of 20 days, and that unpaid vacation days earned under Harr-Wood's tenure would be waived.

Basso testified that after Blake agreed to an effective date of May 20, 1996, for the new schedule, he and Castaldo, caucused and concluded that Blake's vacation proposal would enable the Respondent to agree to an 18-month wage freeze, insurance premium increase, and other components of the economic package. Basso and Castaldo both testified that Blake was asked to put the Union's vacation proposal in writing. Regarding this Blake testified. ''I imagine they did, I certainly didn't do it myself though.'' However, at the hearing Blake also denied that they actually had asked him to write the Respondent a letter stating what the vacation proposal was.

Castaldo testified that he received a letter from Blake on May 23 or 24 regarding the vacation proposal stating that as of May 20, 1996, section 17.1(a) would be deleted, 17.1(b) would be the vacation schedule with a maximum of 4 weeks' vacation, and those who had earned vacation and had not taken it as of May 20, 1996, would be deemed to have waived it. Basso testified that at a meeting with Castaldo on June 11, 1996, he saw the Blake letter and commented, ''Yep, that's the deal.'' The Respondent implemented the new vacation schedule about June 1996 after allegedly receiving the Blake letter and also implemented an insurance increase which was part of the economic package.[18]

On May 23, 1996, Barrett sent a draft agreement to Basso for review. By letter in response Basso revised the draft language of the vacation article focusing on the elimination of the fourth level of vacation benefits under paragraph 17.1(b) of the Harr-Wood agreement. On June 10, 1996, a second draft agreement was delivered to Basso who responded to the Union that noting the complexity of the review process, specifically reserved the Respondent's rights. On June 21, 1996, Barrett sent a fax to Basso stating there was a problem with the vacation agreement, stating that workers who earned less than 20 days were told that they would lose up to 5 days. Basso testified that he understood the fax to mean that 5 days were being taken from everyone. In Basso's reply to Barrett's fax he referred to the Union's ''Fact Sheet'' as to what had been agreed to.[19] On August 5, 1996, Barrett again, wrote to Basso regarding vacation stating that the chief steward had been told that the Respondent's manager, Gary Ludwigsen, ''fixed everyone's vacation and all employees lost 5 days.''

At the Respondent's request, Basso, Castaldo, and Barrett met on October 11, 1996, to discuss the vacation issue. At the meeting the Respondent stated its understanding of the vacation agreement. The Union disputed the Respondent's version of the proposal. Barrett testified that she did not consider the October 11 meeting to be a negotiating session. However, Basso testified that he and Castaldo were prepared

[16] The ''Loretto'' agreement was a collective-bargaining agreement signed between the Union and Loretto Heights, a comparable facility to the Respondent's in Oswego, New York, in 1995 while the Union was negotiating with the Respondent. The ''Loretto'' schedule provide for three tiers with a maximum of 20 days' vacation for those whose length of continuous service is 10 or more years.

[17] While Basso maintained that Castaldo had not agreed to any tentative agreement with the Union, in an affidavit dated August 1996, given to a Board agent, Basso stated that on information and belief, on May 20, 1996, the Union and the Respondent reached agreement on the terms and conditions of a new collective-bargaining agreement, conditioned on a certain guarantee to be furnished by the pension fund.

[18] The Union contested the existence of any Blake letter although it and the Respondent made efforts to find a copy of the letter unsuccessfully. The Union filed a grievance regarding the implementation of the vacation proposal. On August 12, 1996, the grievance was adjourned so the parties could locate the Blake letter. Efforts to locate the letter were unsuccessful.

[19] On June 13, 1997, the Union submitted a ''Fact Sheet'' to its membership for a ratification vote which purported to indicate the terms of the agreement. The ''Fact Sheet'' stated that the ''Pre-92'' vacation schedule was being eliminated effective May 20, 1996. The Union ''Fact Sheet'' also contained an incomplete sentence that read, ''Employees who have not used vacation days on or before May 20, 1996 under the former vacation schedule will be deemed to have'' (sic). Blake admitted that with respect to the ratification vote, the vacation concession was politically sensitive and the Union did not want to red flag to its membership the concession made on vacations.

to negotiate the issue again but the Union broke off negotiations.

On October 8, 1996, Barrett sent Basso a third agreement. Basso's response by letter to Barrett noted his objections to the proposed language regarding vacations as it did not allegedly reflect the Blake proposal and the agreement of May 20, 1996. Both Castaldo and Basso testified that the Respondent has always been willing to return to the bargaining table to discuss the issue of vacations. It has been the Union's position that agreement on the vacation issue had already been reached.

Vacation schedules contemplate a period of time for the accrual of the benefit followed by a period of time during which the employee can take the vacation that has been accrued. These time periods for the accrual and the taking of vacation are tied to the employees individual anniversary date. Therefore, when a vacation proposal includes a change in the schedule of benefits as of a certain date, consideration must be given to whether the change is to effect vacation already accrued under the old schedule and if so what the effect will be. The Respondent asserts that complications inherent in understanding the proposals were illustrated during the hearing by various examples posed to witnesses by counsel. In this case the complication was compounded by the fact that some of the vacation employees had accrued was earned under Harr-Wood's tenure and some earned under Sunrise's tenure. Thus, if some employees were to lose vacation days earned under Harr-Wood, those days would not have been ''paid'' days.

The new vacation schedule implemented by the Respondent in or about June 1996 took back accrued vacation days from employees who had accrued 20 days or less of vacation. The Union by a series of letters notified the Respondent that this was not what had been agreed to on May 20, 1996.[20] The General Counsel contends that there was a meeting of the minds on an agreement with respect to vacations. The Respondent asserts that there was a misunderstanding with respect to the Union's May 20, 1996 vacation proposal.

Credibility

As to the credibility of the respective parties witnesses, after carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976). I tend to credit the account of what occurred here as given by the General Counsel's witnesses. Although at times inconsistent their testimony was given in a believable and forthright manner, and was generally corroborative of each others and with other evidence in the record. This is not to say that I totally disbelieve and discredit the testimony of the Respondent's witnesses, in some respect it supported that given by the General Counsel's witnesses. Of additional significance in my credibility finding is the failure of the Respondent to call Dawn Fiedler and James Donohue as witnesses for the Respondent without explanation to corroborate, clarify or rebut any of the testimony given here.[21]

B. *Analysis and Conclusions*

1. The unilateral reduction in Grinnell's wages

Section 8(a)(5) and Section 8(d) of the Act oblige in employer to bargain with the representative of its employees in good faith with respect to ''wages, hours and other terms and conditions of employment.'' *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958); *Fiberboard Corp. v. NLRB*, 379 U.S. 203 (1964). Section 8(a)(5) also obligates an employer to notify and consult with a union concerning changes in wages, hours, and conditions of employment before imposing such changes without first giving the union an opportunity to bargain about them. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Pinkston-Hollar Construction Services*, 954 F.2d 306 (5th Cir. 1992). Such prior notice to the union must be timely so that the union may have a reasonable opportunity to evaluate the proposal and present a counterproposal before the change takes place. E.g., *M & M Contractors*, 262 NLRB 1472 (1982); *Ciba-Geigg Pharmaceutical Division*, 264 NLRB 1013 (1982). To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. *Ladies Garment Workers Union (McLaughlin Mfg. Corp.) v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972); *Medicenter Mid-South Hospital*, 221 NLRB 670 (1975). Notice of a fait accompli is not timely notice. *NLRB v. R. H. Belo Corp*., 411 F.2d 959 (5th Cir. 1969), cert. denied 396 U.S. 1007 (1970). Where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. *Haddon Craftsman*, 300 NLRB 789 (1990); *Jim Walter Resources*, 289 NLRB 1441 (1988); *Clarkwood Corp*., 233 NLRB 1172 (1977); *Medicenter Mid-South Hospital*, supra. However, if the notice is given in too short a time before implementation of the change because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli *Ciba-Geigg Pharmaceutical Division*, supra; *Ladies Garment Workers Union (McLaughlin Mfg., Corp.)*, supra.

First, it should be noted that the status quo at the time of the unilateral reduction in the hourly wage of Bernadette

[20] The Respondent maintains that even Beth Barrett did not have a clear understanding of the May 20 proposal. Barrett testified that none of the time the Union agreed to waive or forfeit was accrued by employees while working under Harr-Wood. However, on cross-examination she admitted that with respect to some employees the time to be forfeited may have been accrued under Harr-Wood. Later, she contended that if an employee had to give back unpaid vacation days (i.e., days accrued under Harr-Wood and taken off without pay) they were ''non-existent'' days.

[21] An adverse inference may properly be drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party. Contrast *Goldsmith Motors Corp*., 310 NLRB 1279 fn. 1 (1993); *Property Resources Corp*. 285 NLRB 1105 fn. 2 (1987), enfd. 863 F.2d 964 (D.C. Cir. 1988).

Also, from the failure of a party to produce material witnesses or relevant evidence without satisfactory explanation, the trier of the facts may draw an inference that such testimony or evidence would be unfavorable to that party. *7-Eleven Food Store*, 257 NLRB 108 (1981); *Publishers Printing Co*., 233 NLRB 1070 (1977); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 (1977).

Grinnell was that Grinnell was an ''offscale'' CNA. Such ''offscale'' employees served under the Respondent's tenure and were recognized by it for more than 8 months prior and paid at a rate above the pay scale for CNA's as provided for in the Harr-Wood agreement. A unilateral change in an established practice affecting terms and conditions of employment without bargaining with the Union or with the Union waiving its right to such bargaining would constitute a violation of the Act. *Blue Circle Cement Co*., 319 NLRB 661 (1995). However, despite the fact that an employer may have made a unilateral change in a mandatory subject of bargaining, it is well settled that such action may be permissible if the Union has waived its right to bargain over the particular matter. But such waiver must be ''clear and unmistakable.'' *Metropolitan Edison Co. v. NLRB*, 460 U.S. 698 (1983). *Merillat Industries*, 252 NLRB 784 (1980); *Murphy Diesel Co*., 184 NLRB 757 (1970), enfd. 454 F.2d 303 (7th Cir. 1971).

Section 8(a)(5) requires an employer, after reaching a decision concerning a mandatory subject, to delay implementation thereof until after it had consulted with the bargaining representative of its employees, but does not require that the employer delay the decision-making process itself. *Mercy Hospital of Buffalo*, 311 NLRB 869 (1993); *Haddon Craftsman*, supra; *Lange Co*., 222 NLRB 558 (1976).

The General Counsel contends that the Respondent violated Section 8(a)(5) by failing to give the Union timely notice and an opportunity to bargain over its decision to reduce the wages of Bernadette Grinnell. While the Union admits that it made no request to bargain about this at the January 18, 1996 negotiation session, it did protest this decision and offered as a reason for not requesting bargaining, that the Respondent had already made its decision and such a request would be futile.

The Respondent asserts that the Union, in fact, had timely notice of its intention to reduce the wages of Grinnell and an opportunity to bargain about this but that the Union failed to do so and thereby waived its right to bargaining. When an employer notifies a union of proposed changes in the terms and conditions of employment, it is incumbent on the union to act with due diligence in requesting bargaining. *Haddon Craftsmen*, supra; *Jim Walter Resources*, 289 NLRB 1441 (1988); *Kentron of Hawaii*, 214 NLRB 834 (1974); *NLRB v. Pinkston-Hollar Construction Services*, 954 F.2d 306 (5th Cir. 1992). Any less diligence amounts to a waiver by the bargaining representative of its right to bargain. *NLRB v. Pinkston-Hollar Construction Services*, supra; *Jim Walter Resources*, supra.

In *Pinkston-Hollar Construction Services*, 312 NLRB 1004 (1993), the Board, citing the standard set forth in *NLRB v. Citizens Hotel Co*., 326 F.2d 501 (5th Cir. 1964), and *Nabors Trailers*, 910 F.2d 268 (5th Cir. 1990), cert. granted 111 S.Ct. 1680 (1991), cert. dismissed pursuant to Rule 46, 1125. Ct. 8 (1992) stated:

> It is true, of course . . . that an employer may make changes without the approval of the union as the bargaining agent. The union has no absolute veto power under the Act. But there must be discussion prior to the time the change is initiated. An employer must at least inform the union of the proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals.

Thus, the Respondent must give the Union sufficient notice and opportunity to bargain. Under the circumstances in the case I do not believe the Respondent informed the Union of its proposed action ''under circumstances which afforded a reasonable opportunity for counter arguments or proposals.''

After receiving notice on January 17 or 18, 1996, by two certified nurses aides that their wages were to be reduced Perry visited the Respondent's administrator, James Donohue, that day. Donohue showed Perry a list of employees who would be affected by wage reductions who were being paid as GPNs but who had not passed their licensing exams for this position. Presumably Bernadette Grinnell's name was on that list. At the January 18, 1996 negotiation session, Perry raised the issue of the proposed reduction in ''GPN'' salaries and angrily protested the Respondent's intended action, because the Respondent had failed to notify the Union directly beforehand.[22] In response to Perry's protest.[23] Edward Leffler, the Respondent's own witness, testified that he explained the rationale to the Union at this meeting as being the Respondent's reluctance to pay GPN wages to employees functioning as nurses aides. This is consistent with Barrett's testimony that Leffler did not mention that the Respondent would be reducing the wages of CNA's or ''offscale'' employees. Leffler also stated that Perry seemed to be confused about the Respondent's intent regarding the adjustment of the wages of the GPNs. Moreover, the notes of the January 18, 1996 meeting reflect that Donohue stated at this meeting that five employees were no longer recognized as nurses unless they took their CNA board exams and even then as CNAs they should not be paid as GPNs. Grinnell was already a licensed CNA and, therefore, apparently not one of the five employees who would be affected by Donohue's statement.[24]

Thus, it appears from the record that the Respondent never gave the Union clear and unequivocal notice that Grinnell's wages would be reduced at the January 18, 1996 bargaining session since the Respondent announced at the meeting that it would be reducing the wages of unlicensed GPNs, not CNAs or ''offscale'' employees of which Grinnell was one. Additionally, the Union could, therefore, make no proposals regarding Grinnell, as it was unclear that Grinnell was in-

[22] The fait of Castaldo's admission that the Respondent was not obliged to notify the Union of the changes in wages made at the January 18, 1996 meeting, and that some employees were directly notified beforehand that their salaries were going to be reduced, and that Castaldo not only was angry at Perry for coming late to the meeting but also because she raised the issue of the proposed reduction in GPN salaries at the January 18 meting, coupled with the fact that discussion of the subject was initiated by Perry at this bargaining session, could possibly be construed to manifest an intent by the Respondent to avoid its obligation to bargain about this altogether with the Union, and supports the Union's apparent belief that the Respondent's decision regarding this was a fact accompli.

[23] The Board has held that a union must promptly request bargaining to avoid a waiver, and merely protesting the impending change is not sufficient. *Ciba-Geigy Pharmaceutical Division*, supra; *Clarkwood Corp*., supra; *American Buslines, Inc*., 164 NLRB 1055 (1967).

[24] Donohue did not testify herein to clarify or contradict this and the notes of Ayotte support this inference.

cluded in the category of employees whose wages were to be reduced. Also, the Respondent failed to provide the Union with a list of the employees who would have their wages reduced at the January 18, 1996 meeting. In fact, Perry testified that she had discussions with Donohue three or four times after the January 18, 1996 meeting to find out about the employees who were being affected by the wage reduction and why their wages were being adjusted.

Additionally, it would be disingenuous for the Respondent to argue that the Union should have made proposals regarding the reductions of any of the employees wages at the January 18, 1996 negotiating session in view of Leffler's allegedly asking the Union ''whether or not they had any alternatives to this approach.'' The Union had unexpectedly learned of the Respondent's decision on January 17 or 18, but more likely at the January 18, 1996 meeting, and could hardly be expected to make proposals or suggestions without the benefit of considering the matter. Additionally, despite the Respondent's assertion that the matter was discussed for an hour or more at the January 18 session, this is seemingly contradicted by Ayotte's notes from that session which suggests that the matter was only discussed from 2:45 to 2:55 and the Respondent's representatives quickly moved the discussion on to other items for negotiation. It can hardly be said that the Union had a fair opportunity to bargain over the proposed reductions at that meeting. A union must be given a reasonably opportunity to evaluate and to present counterproposals before a change is implemented by an employer. *San Antonio Portland Cement*, 277 NLRB 309, 310 (1985).

The record also shows that Grinnell was directly informed by Director of Nursing Dawn Fiedler sometime between January 21 and 28, 1996, that her next week's paycheck would be reduced. She then advised Perry about this one day later which would be sometime between that period. Grinnell's paycheck was actually reduced on January 28, 1996. It is noteworthy that while Perry was having discussions with Administrator Donohue about the wage reduction after January 18, 1996, the Respondent implemented the first wage reduction on January 21, 1996. Since Perry testified that she learned about Grinnell's wage reduction after the January 18 meeting, and Grinnell's testimony that she informed Perry of the change about one day after Fiedler told her that her wage would be reduced as of the following week (January 21–28) coupled with the fact that Grinnell's wage was reduced on January 28, then notice to the Union about the proposed reduction could be imputed not earlier than January 21. By this time the Respondent had already implemented the first wage reductions, thus implicitly indicating that its overall decision to reduce the wages of the eight employees (including Grinnell) was final as of January 21. Such notice then, given when the Employer has no intention of changing its mind, amounts to nothing more than informing a union of a fait accompli. *Ciba-Geigy Pharmaceutical Division*, supra. Also see *Intersystems Design Corp*., 278 NLRB 759 (1956).

In the absence of clear notice to the Union of an intended change, there is no basis on which to find that the Union waived its right to bargain. *Mercy Hospital of Buffalo*, supra.

Moreover, assuming arguendo that, as the Respondent asserts, the Union had timely notice of Grnnell's wage reduction as of January 18, 1996, it does not necessarily follow that the Union had waived its right to bargain over the reduction when it failed to request bargaining before the change was actually implemented on January 28.[25] First, it should be noted that the Board has held that a waiver of bargaining rights is not to be lightly inferred and must be clearly and unequivocally conveyed. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 698, 708 (1983); *Caravelle Boat Co*., 227 NLRB 1355 (1977).

At the January 18 session, Castaldo told the Union that the Respondent did not have to talk to the Union about the reduction in wages and Castaldo believed as late as June 1996 that the Respondent did not have to notify the Union before the wages were changed. Also the record reflects an indication that the Respondent was less then forthcoming about expressing an interest in having the Union involved in this matter. The Union received its first notice about a change from the employees and not from the Respondent. The Respondent expressed no intent to involve the Union in this matter, until the Union itself brought it up at the January 18 meeting. The first reductions were implemented on January 21 and, therefore, it cannot be said from the record that the Union was ''sitting on its hands'' in the matter. The Board has found that a Union which, faced with an employer who manifests a refusal to bargain, does not request bargaining over a unilateral change cannot be said to have waived its right to do so.

Intersystems Design Corp., 278 NLRB 759, 760 (1986), *Insulating Fabricators, Inc*., 144 NLRB 1325, 1331–1333 (1963).

As the Court of Appeals for the Fifth Circuit stated in *Gulf States Mfg. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983):

> It is . . . well established that a union cannot be held to have waived bargaining over a change that is presented as a fait accompli . . . . ''An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals.'' . . . Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated.

This is applicable to what occurred in this case.

From the record evidence in this case, I find and conclude that when the Respondent unilaterally changed the pay rate of Bernadette Grinnell without prior timely notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representatives of its employees in violation of Section 8(a)(1) and (5) of the Act.

2. The ''Take Back'' of accrued vacation

The amended consolidated complaint alleges that the Respondent on or about June 20, 1996, unilaterally took back accrued vacation days from bargaining unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct in violation of Section 8(a)(1) and (5) of the Act.

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[25] Contrast *RBE Electronics of S.D., Inc*., 320 NLRB 80 (1995); *Haddon Craftsmen, Inc*., supra; *Clarkwood Corp*., supra; *American Buslines, Inc*., supra.

The General Counsel asserts that the parties reached a meeting of the minds on vacation waiver at the May 20, 1996 negotiation session. The Respondent maintains that there was a misunderstanding with respect to the Union's May 20 vacation proposal and no meeting of the minds took place on this issue.

Once an agreement is reached by the parties, they are obligated to abide by the terms of the agreement even though those terms have not been reduced to writing. *H. J. Heinz v. NLRB*, 311 U.S. 514 (1941). The existence or nonexistence of an agreement, and what the terms are, if one is found to exist, are questions of fact. *Metro Medical Group*, 307 NLRB 1184 (1992); *NLRB v. Electrical Workers IBEW Local 22*, 748 F.2d 348 (8th Cir. 1984).

The legal principles applicable are well settled. A collective-bargaining agreement is formed only after a ''meeting of the minds'' on all substantive issues and material terms of the contract. *Intermountain Rural Electric Assn.*, 309 NLRB 1189 (1992). The question of contract formation is based on the parties' expressed intentions regarding the terms of a collective-bargaining agreement, and this is true regardless of whether a document has yet been signed. The General Counsel bears the burden of proving whether the requisite meeting of the minds has occurred. *Kelly's Private Car Service*, 289 NLRB 30 (1988), and cases cited there, enfd. 919 F.2d 839 (2d Cir. 1990). Here, the General Counsel must establish by a preponderance of the evidence that there was a meeting of the minds between the Union and the Respondent with respect to the vacation proposal. *Cherry Valley Apartments*, 292 NLRB 38 (1988).

It is the position of the General Counsel that the parties agreed on May 20, 1996, to the Loretta Heights vacation schedule and that only employees earning in excess of 20 days would waive accrued vacation. I believe that the record evidence supports this contention.[26] For example, in response to Barrett's first draft of the vacation schedule (which did not contain language regarding the waiver), Basso on May 29, 1996, wrote that Barrett's proposed language ''[did] not accurately reflect the May 20, 1996 vacation settlement.'' Specifically, with respect to the waiver, Basso suggested language stating that employees who had not used vacation days accrued under the old schedule ''will be deemed to have waived vacation in excess of 20 days.''[27] This made no differentiation between paid or unpaid accrued vacation or vacation accrued under Harr-Wood or Sunrise's tenure. Moreover, both Barrett and Blake testified unequivocally that the Union did not forfeit vacation for employees earning 20 days or less and Barrett maintained this position throughout her correspondence to the Respondent. Seemingly, the Respondent at first agreed with the Union's position, then changed its mind asserting in its brief that ''In sum, the evidence on the whole is that there was a misunderstanding with respect to the Union's May 20th vacation proposal.''[28]

Additionally, after the Respondent had unilaterally implemented the vacation waiver as it alleges was agreed to, Barrett reported to Basso by fax that a problem had arisen with its implementation in that ''G. Ludwigsin [a Manager] has told workers who earned less than 20 days, they also loss up to 5 days.'' Basso responded ''this is not correct, I do not know where Gary L. got this from.'' This would imply that it was not agreed that employees who had earned 20 days or less of vacation would waive that vacation. There is no credible evidence in the record that the Union ever agreed to the vacation waiver that was implemented by the Respondent (to the extent that vacation was taken from those who had earned 20 days or less).

From all of the above, I find and conclude that the Union and the Respondent had a ''meeting of the minds'' on the issue of the vacation plan—including an agreement that only employees earning in excess of 20 days would waive their accrued vacation.[29] The Respondent's claim that there was a misunderstanding with respect to the Union's May 20, 1996 vacation proposal is unavailing. Not only does the documentary evidence prove otherwise, but claimed misunderstanding of the proposal, in light of the evidence of a meeting of the minds, will not defeat a finding that agreement was reached. *Langston Cos.*, 304 NLRB 1022, 1046 (1991). The same has been found by the Board, where one party claims that it mistakenly agreed to a provision. *Los Angeles Local, American Federation of Television & Radio Artists*, 310 NLRB 1039 (1993). By the unilateral ''take back of accrued vacation days from bargaining unit employees after agreement had been reached on the vacation issue'' the Respondent has thereby failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

[26] It should be noted that the credited evidence shows that the Respondent believed that at the May 20, 1996 negotiation session the parties had reached an agreement including the vacation issue. It is the Respondent's contention then that there was a misunderstanding on its part as to what the agreement on this issue was and that no meeting of the minds occurred.

[27] The letter of agreement sent by the Union to the Respondent similarly states that ''Employees who have not used vacation days on or before May 20, 1996, under the former vacation schedule will be deemed to have waived such unused vacation in excess of twenty (20) days.''

[28] In its October 1, 1996 response to the Union's September 24, 1996 vacation proposal Basso noted that ''Employees who have not used-up vacation days under the previous Schedule, practice or policy for the period April 21, 1995 to April 28, 1996 will be deemed to have waived such unused vacation.'' This is a drastic change from the language used by Basso previously in his understanding of what was agreed to. Also the Respondent points to the Union's ''Fact Sheet'' as in some way supporting its contentions. The ''Fact Sheet'' states that, ''Employees who have taken scheduled vacation days in excess of twenty (20) days prior to May 20, 1996 shall not be penalized. Employees who have not used vacation days on or before May 20, 1996, under the former schedule will be deemed to have . . . .'' The sentence is unfinished and thus ambiguous. It can be completed to read ''waived those vacation days,'' or completed to read ''waived vacation days in excess of twenty (20) days.

[29] The facts in the case cited by the Respondent in its brief to support its position here, *Cherry Valley Apartments*, 292 NLRB 38 (1989), are quite different than those present in the instant case. As the Board stated in *Cherry Valley*, ''Accordingly, in the light of the doubts raised by the confusion in the record, we find that the General Counsel has failed by a ponderance of the evidence to establish that there was a meeting of the minds between the Union and Respondent with respect to all the terms of a collective-bargaining agreement.'' There was no such ''doubts raised by the confusion in the record'' in the present case.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unilaterally and unlawfully changed the pay rate of Bernadette Grinnell without prior timely notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct, the Respondent shall be ordered to rescind the change in her pay rate and make Bernadette Grinnell whole for any loss of earnings or other benefits by reason of the change in her wage rate in accordance with the Board's decision in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing Co*., 138 NLRB 716 (1962). The Respondent shall also be ordered to bargain with the Union as to any proposed reduction in Grinnell's wage rate thereafter.

Having found that the Respondent unilaterally and unlawfully took back accrued vacation days from bargaining unit employees without prior notice to the Union and after agreement had been reached by the parties on this issue, the Respondent shall be ordered to adhere to the terms of the vacation waiver agreed to by the parities as found here by me.[30] The Respondent shall also be ordered to make whole employees for any loss of earnings and benefits occasioned by reason of the Respondent's unlawful take back of accrued vacation days in accordance with the Board's decision in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing Co*., 138 NLRB 716 (1962).

The Respondent in its brief asserts that ''Even if it were found hat the employer violated Section 8(a)(5) a make whole remedy would not be warranted as the violation would be at most a technical one as Sunrise did bargain in good faith over the vacation issue.'' I do not agree that the violation here was a mere technical one. As to the Respondent's request for it to recover the additional insurance premiums paid ''under the assumption that the vacation component of the economic package would result in the waiver of vacation days both paid and unpaid that exceeded the Loretto schedule, I believe that that issue was inherently disposed of above.'' However, the Respondent is free to raise this issue as part of its case at the compliance stage of these proceedings.

Moreover, the evidence herein indicates that the parties reached agreement on all other issues of a collective-bargaining agreement conditioned on a certain guarantee to be furnished by the Union's pension fund. As to these agreements the Respondent would not be privileged to withdraw any of those reached with the Union at the May 20, 1996 bargaining session.

Because of the nature of the unfair labor practices here found, and in order to make effective the interdependent guarantees of Section 7 of the Act, I shall recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. The Respondent, Sunrise Nursing Home, Inc., is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. Sunrise Nursing Home, Inc. is a successor to Harr-Wood Nursing Home.

3. Local 200A, Service Employees International Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All regularly scheduled full-time and part-time service and maintenance employees, technical and clerical employees employed by the Respondent, excluding all professional, managerial and confidential employees, guards and supervisors as defined in the Act, as amended.

5. At all times material here and since April 21, 1995, the Union has been the exclusive collective-bargaining representative of the Respondent's employees in the above unit.

6. On or about January 29, 1996, the Respondent unlawfully unilaterally changed the pay rate of employee Bernadette Grinnell without prior timely notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct in violation of Section 8(a)(1) and (5) of the Act.

7. In or about June 1996, the Respondent unlawfully unilaterally took back accrued vacation from bargaining unit employees which was not in excess of 20 days in violation of Section 8(a)(1) and (5) of the Act.

8. The aforesaid unfair labor practice affect commerce within the meaning of Section 2(6) and (7) of the Act.

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[30] As the Board stated in *Transit Services Corp*., 312 NLRB 477, 483 (1993), while a withdrawal of a previously agreed proposal is not necessarily violative of the Act or indicative of bad faith, *Dubuque Packing Co*., 287 NLRB 499 (1987); *Reliable Tool Co*., 268 NLRB 101 (1983); *NLRB v. Tomco Communications*, 567 F.2d 871 (9th Cir. 1978); *Food Services Co*., 202 NLRB 790 (1973), such a withdrawal will be considered unlawful and designed to frustrate bargaining unless the Employer demonstrates that it had good cause for the withdrawal of proposals to which it had previously agreed. *Natico, Inc*., 302 NLRB 668 (1991); *Arrow Sash & Door Co*., 281 NLRB 1108 fn. 2 (1980); *Northwest Pipe & Casing Co*., 300 NLRB 726 (1990); *NLRB v. F. Strauss & Sons, Inc*., 536 F.2d 60 (5th Cir. 1976); *Mead Corp*., 256 NLRB 686 (1981), enfd. 697 F.2d 1013 (11th Cir. 1983).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

The Respondent, Sunrise Nursing Home, Inc., Oswego, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the pay rate of Bernadette Grinnell without prior timely notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

(b) Unilaterally taking back accrued vacation from bargaining unit employees which was not in excess of 20 days.

(c) In any like or related manner interfering, with restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral change in the pay rate of Bernadette Grinnell and make her whole for any loss of earnings and other benefits suffered by her as a result of such change in the manner set forth in the remedy section of this decision.

(b) Adhere to the parties agreement with respect to the vacation waiver in excess of 20 days and make whole unit employees from any loss of earnings or other benefits suffered by them as a result of the Respondent's unilateral take back of such vacation days not in excess of 20 days in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Bernadette Grinnell's wage change and the Respondent's take back of vacation days of unit employees not in excess of 20 days and within 3 days thereafter notify Grinnell and the employees in writing that this has been done and that the Respondent's unlawful actions will not be used against them respectively.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Oswego, New York, copies of the attached notice marked ''Appendix.''[32] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees by the Respondent since March 18, 1996.

(f) Within 14 days after the service by the Region, file with the Regional Director for Region 3, a sworn affidavit of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally change the wage rate of Bernadette Grinnell without timely notice to the Union and without affording the Union an opportunity to bargain with us with respect to this conduct.

WE WILL NOT unilaterally take back from employees accrued vacation not in excess of 20 days.

WE WILL NOT in any like or related manner, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the unilateral change in the pay rate of Bernadette Grinnell and make her whole for any loss of earnings and other benefits suffered by her as a result of our unlawful action plus interest.

WE WILL adhere to our agreement with the Union with respect to the vacation waiver of 20 days and make whole unit employees for any loss of earnings or other benefits suffered by them as a result of our unilateral take back of such vacation days not in excess of 20 days, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful unilateral change in the pay rate of Bernadette Grinnell, and the unilateral take back of accrued vacation days from bargaining unit employees, and WE WILL within 3 days thereafter, notify them in writing that this has been done and that it will not be used against them in any way.

SUNRISE NURSING HOME, INC.